IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 592 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

JAYANTILAL C PATEL

Appearance:

1. Criminal Appeal No. 592 of 1991

MR RC KODEKAR, APPP for Appellant

ABATED for Respondent No. 1 & 2

MR DK MODI for Respondent No. 3-6

MR MD MODI for Respondent No. 3-6

(MR BK PARIKH) for Respondent No. 7

NOTICE UNSERVED for Respondent No. 7

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 13/12/2004

ORAL JUDGEMENT

The State of Gujarat has preferred this appeal challenging the judgment and order of acquittal passed by the learned Judicial Magistrate (First Class), Jagadia in Criminal Case No. 189 of 1988. The original accused had been prosecuted by the State for having committed offence punishable under Sec.7 read with Sec.16(1) of the Prevention of Food Adulteration Act (hereinafter referred to as 'the Act'). The judgment and order are dated 7th June 1991.

2. According to the prosecution, Dilipkumar Trambaklal Trivedi was the Food Inspector at the relevant time discharging duty as the Food Inspector of the State and was working under the Commissioner of Gujarat State Food and Drugs Department. According to the prosecution, on 9th Sept.1987, the Food Inspector on his usual round, at about 12.15 noon, had visited the restaurant known as "Ambika Tea Stall" in Rajpardi village in Jagadia Taluka. The said restaurant belonged to respondent No.2 Parshottam Chitabhai Patel, but at the relevant time, he was absent and the restaurant was manned by respondent No.1 - Jayantibhai Chitabhai Patel as the Manager. The Food Inspector gave his identity and expressed his desire to take a sample of the ground-nut oil from the packed tin of 15 kgs. which was of "Maruti" brand. On the tin, the label was pasted which also indicated the name of its manufacturer, i.e. M/s.Maruti Industries, Near Rupam Talkies, Amreli. The tin was opened and the Food Inspector collected 450 gms. of ground-nut oil from the said tin in a dry clean steel vessel. He thereafter paid the amount of Rs.12.50 towards purchase price. He, thereafter brought three glass bottles which were clean and dry and transparent. He made three equal parts of the ground -nut oil and filled in the bottles. After packing and sealing the bottles, as per the requirement of the Prevention of Food Adulteration Rules, he dispatched one sample to the Public Analyst at Baroda for analysis. He also sent separately the specimen seal along with the memorandum as required under Rule 18 of the said Rules. The remaining two samples were sent to the local health authority, namely, Mr.A.I.Shah, Assistant Commissioner, Foods and Drugs. Subsequently, he received the report of the Analyst which indicated that the sample did not conform to the standard prescribed under the Act and Rules and hence it was found to be adulterated. On receipt of the report, he forwarded the same to the local health authority along with all the relevant papers pertaining to the said case for obtaining necessary orders for prosecution. It

appears that at the time when the sample was collected and the panchnama was drawn of the event, it was brought to the notice of the Food Inspector by respondent Nos.1 and 2 that the tin was purchased by them from respondent No.3 who in turn, had purchased the said tin from respondent Nos.4 and 5 who happened to be the partners of respondent No.6 - Salim Traders, a partnership firm. As stated above, respondent No.3 purchased the oil as trader. Respondent No.7 is nominee of the producers of the offending article vis. M/s.Maruti Industries, Amreli. In support of the case, respondent Nos.1 and 2 produced the bill dated 8th Sept.1987 which is at Exh.52 on record. In view of the same, necessary notice was given by the Food Inspector to the respondents. It appears that the sanctioning authority accorded its sanction for prosecution by its order dated 19th Feb.1988. In view thereof, the Food Inspector ultimately prosecuted respondents Nos.1 and 2 and also impleaded other accused in the case. The report as well as relevant copy of the complaint were dispatched to respondent Nos.1 and 2. They appeared before the learned Magistrate. They did not choose to exercise their right to re-examine the sample by the Director, Central Food Laboratory.

2.1 At the trial, the respondents pleaded not guilty and claimed to be tried. The plea of respondents Nos.1 and 2 was that the offending commodity was purchased by them from respondent No.3 and it was stored in the same condition when the sample was collected. They placed reliance on the bill at Exh.52 and claimed defence of warranty.

2.2 At the trial, the Food Inspector was examined by the prosecution to substantiate its case. His deposition is recorded at Exh.22. In the examination in chief, he has narrated about the manner in which the sample was collected on 9th Sept.1987 and also the formalities which he performed in detail at the time of collecting the sample as well as packing and sealing them in the glass bottles and sending one sample to the Public Analyst and two samples to the local health authorities. His examination in chief also reflects that due intimation with regard to filing of the complaint was given to the respondents. He also produced a bill bearing No.1950 dated 8th Sept.1987 showing that respondent No.3 had purchased from respondent No.6, 15 ground-nut oil tins and the bill produced by respondent No.6 showing the purchase of oil tins from respondent No.7. In the cross examination by the defence, he has stated that he is a qualified Food Inspector and at the relevant time, he was

on duty with the raiding party under his jurisdiction. Defence tried to suggest that the place from which the offending article was purchased by him was not a restaurant but respondent No.1 was staying in the said property with his family. He has denied this suggestion. He is also cross examined on the aspect of the bottles in which the sample was collected. He has stated that he did not have any knowledge as regards who had purchased the bottles, but he has also stated that as and when the bottles were required, they were obtained from the store and before being used, they were being cleaned with Surf powder. He has denied the suggestion that the bottles were not clean and they were containing moisture. On behalf of respondent No.7, he has stated that he had filled in each bottle 150 gms. of oil, however, the same was not weighed. His attention was drawn to the memorandum in Form No.7 in which in column 4 it was stated that 200 gms. of oil was sent for analysis. He has rendered explanation for the same.

2.3 The prosecution has also examined one Jafrullakhan Khatri, who has acted as panch at the time of collection of the sample. His evidence is at Exh.74. He has not supported the prosecution and he has turned hostile. His evidence is, therefore, hardly sufficient to establish the case against the respondents.

2.4 The learned Magistrate, at the end of the trial, came to the conclusion that the prosecution has failed to prove its case against the respondents beyond any reasonable doubt. According to the learned Magistrate, the sanction was accorded without application of mind. He has also found that the defence of warranty was not proved and that there was no evidence to show that the concerned tin was stored in the same condition it was purchased from the dealer. He has also found that there was no reliable evidence to show that the bottle containing samples were clean and moistureless.

2.5 It is the above judgment and order of acquittal which is challenged in this appeal.

3. I have heard Mr.R.C.Kodekar, learned APP and Mr.D.K.Modi, learned Advocate for respondents Nos.3 to 6. Respondents Nos.1 and 2 have expired and the appeal against them has abated.

4. With a view to re-appreciate the entire evidence, I have gone through the record of the appeal and I have also heard Mr.Kodekar and Mr.Modi. Mr.Kodekar has submitted that the judgment and order of acquittal passed

by the trial Court are erroneous. In his submission, it is duly proved by the prosecution that the oil was purchased by respondents Nos.1 and 2, who inturn, had purchased it from respondents Nos.4, 5 and 6. He has further submitted that there is no defect in the sanction accorded by the authority concerned. According to him, the appeal deserves to be allowed and the respondents are required to be convicted.

4.1 As against that, Mr.Modi supported the judgment of the trial Court and has submitted that respondents Nos. 1 and 2 have not entered the witness box and proved their defence of warranty against the rest of the respondents/accused. He has further submitted that even ingredients of Sec.92 of the Act are not established and its benefit of defence of warranty cannot go to respondents Nos.1 and 2. He has also submitted that the sanction is not proper and according to him, the appeal deserves to be dismissed.

5. It is clear from the evidence that the Food Inspector, on the relevant date, visited the restaurant run by respondents Nos.1 and 2. It was respondent No.2 who owned the restaurant and respondent No.1, at the relevant time, was managing it in absence of respondent No.2. It is also clear that from the tin, bearing name of "Maruti" brand ground-nut oil, the offending sample was collected. Respondents Nos.1 and 2 had produced the bill to show that the tin was kept in the same condition and it was purchased by respondent No.3. He, therefore, pleaded defence of warranty. The record, however, shows that the concerned bill which is produced at Exh.52 only indicated ground-nut oil and not "Maruti" brand ground-nut oil. Moreover, respondents Nos.1 and 2 have not entered the witness box and shown any connection or nexus between the tin in question and the bill. When the warranty is pleaded on the basis of any bill, it is the prime duty of the accused claiming the defence of warranty under Sec.19(2) of the Act to establish that the offending article was purchased from the dealer or the original manufacturer and at the time when the sample was collected, it was stored in the same condition. In the present case, however, these facts are missing. The bill produced at Exh.52 on which reliance has been placed by respondents Nos.1 and 2 for claiming the defence of warranty, does not give any indication that it related to the tin in question. The said bill only showed that ground-nut oil was purchased by respondent No.2 from respondent No.3. Whether the bill pertained to the same tin is not revealed from the bill. In that view of the matter, it was the duty of respondents Nos.1 or 2 to

enter the witness box and establish that fact on oath by giving deposition before the Court. That has not been done. It is well settled proposition of law that the person who pleads defence of warranty has to establish it by giving evidence on oath. This Court in a decision rendered in the case of State of Gujarat v. Bhagchand Sadhumal, reported in 1998 (2) GLH 960 has held that when the defence of warranty is pleaded, the burden is on the concerned accused to prove the fact that he purchased the article with written warranty and he stored it in the same condition as he purchased it. This Court has further observed as under:

"8.3 Thus, reading Section 19(2) and Rule 12.A, it becomes clear that if the vendor wants to take up a defence with a view to exonerate himself, then it is for him to prove that he purchased the article of food with a written warranty in terms of Rule 12.A. It is for the vendor to prove that he purchased from the manufacturer as contemplated under Section 19(2) of the Act. It was submitted before the Court that on the container, name of the manufacturer was printed and it was also mentioned on the label that it was laboratory tested, and therefore, it could be said that the goods were supplied by accused No.2 with a written warranty.

8.4 In the case of Murlidhar Shyamlal v. State of Assam reported in (1996) 7 SCC 495, on the container there was a printed label reading as "New Rice & Oil Mill, Raha, pure mustard oil (Biswanath Brand) nett. wt. 16 kg." The Apex Court in paragraph 9 held as under:

"It would only indicate that the packed tin containing the same weighing 16 kg. (nett) with a printed label on it, "New Rice & Oil Mill, Raha, pure mustard oil (Biswanath Brand) nett wt. 16 kg." was stored for sale in the said premises. From this, it is contended that the appellant had the warranty and that, therefore, by operation of Section 19(2) read with Rule 12.A, the appellant is absolved of his liability to be prosecuted for sale of the adulterated article of food. We are afraid that we cannot accept the contention. In view of the above warranty as envisaged under

Form VI-A, there must be specific mention therein by the dealer or distributor or manufacturer, that the article of food sold was in the same nature and quality of the article of food, as the case may be. Then only he would get acquitted, though the article of food was found adulterated. It would be then open to the prosecution to proceed against the manufacturer, dealer or distributor."

8.5 In the instant case, neither the accused No.1 nor anyone on behalf of the accused No.1 has entered the witness box to prove the warranty and/or bill.

8.6 It was submitted by the learned advocate for the accused that in view of proviso to Section 14, the bill is deemed to be a warranty. The said section with proviso reads as under:

"14. No manufacturer or distributor of, or dealer in any article of food shall sell such article to any vendor unless he also gives a warranty in writing in the prescribed form about the nature and quality of such article to the vendor:

Provided that a bill, cash memorandum or invoice in respect of the sale of any article of food given by a manufacturer or distributor of, or dealer in such article to the vendor thereof shall be deemed to be a warranty given by such manufacturer, distributor or dealer under this section."

8.7 However, in the instant case, even the bill is not proved by leading evidence. Therefore, there is no question of considering that submission. It was submitted that the bill is produced on record along with a label, money receipt and the warranty which is in the handwriting along with a list Exh.81. After seeing the bill, learned advocate for the accused No.1 was not able to establish the identity of the article mentioned in the bill and the article of food which was taken as sample. It is obvious that as held by the Apex Court in the case of Murlidher (supra), the warranty is not proved. Even the cash memo does not contain the warranty

as prescribed in Form VI.A. The Apex Court in the case of Murlidhar in para 10 held as under:

"In this case, we cannot make any guess as to what would be the nature of the language used in the cash memo which was not filed in the absence of any specific recital therein. As seen in the recital of the panchnama, there is no mention thereof as envisaged in Form VI.A. Under these circumstances, we are constrained to confirm the conviction and sentence of minimum period of six months; it being mandatory after the Amendment Act, 1976, we cannot interfere with the sentence."

6. In the instant case also, when the bill had some discrepancy, it was the bounden duty of respondents Nos.1 and 2 to enter the witness box and establish on oath that the bill on the basis which the warranty is claimed, related to the offending article. That is not the case here. In view of the aforesaid decision of this Court, the burden which has been shifted on respondents Nos.1 and 2 has not been discharged at all. In that view of the matter, there is no question of saddling the rest of the respondents with the liability of selling of adulterated food. It may be stated here that respondents Nos.1 and 2 are no more and the appeal against them has abated. In view of the aforesaid, the rest of the respondents cannot be held guilty of committing the offence with which they are charged and the appeal stands dismissed against them also.

(Akshay H.Mehta, J.)

Sreeram.